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# In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 122

SECURITY-FIRST NATIONAL BANK OF LOS ANGELES,
*Appellant,*
vs.
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
*Appellee.*
(17 Cases)

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
*Appellant,*
vs.
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
*Appellee.*
(13 Cases)

THE FARMERS AND MERCHANTS NATIONAL BANK OF LOS ANGELES,
*Appellant,*
vs.
FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA,
*Appellee.*
(15 Cases)

On Appeal from the Supreme Court of the State of California

## Motion to Dismiss or Affirm

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(15 Cases)

On Appeal from the Supreme Court of the State of California

## Motion to Dismiss or Affirm

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to dismiss these appeals or to affirm the judgments of the Supreme Court of the State of California for the following reason:

There is no substantial federal question presented as a basis of jurisdiction in this Court inasmuch as the questions presented have been foreclosed by previous decisions of this Court.

## STATUTES INVOLVED

Section 5219 of the Revised Statutes of the United States (12 United States Code, Section 548) and Sections 1, 4a, 23 and 35 of the California Bank and Corporation Franchise Tax Act (Cal. Stats. 1929, Ch. 13, as amended) are set forth in the appendix to Appellants' Jurisdictional Statement. In addition, Sections 2, 3 and 4(1), (2) and (3) of that Act are set forth in the appendix hereto.

## STATEMENT

Appellants, national banking associations, appeal from judgments denying recovery in actions for the refund of taxes imposed under the California Bank and Corporation Franchise Tax Act[1] during the years 1933 through 1949.

The present method of taxing national banks in California, carefully drafted to avoid discrimination,[2] was enacted in 1933,[3] and has been in operation throughout the past 28 years. The method is prescribed by Sections 1 and 4a of the Bank and Corporation Franchise Tax Act.[4]

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1. Stats. 1929, ch. 13, p. 19, as amended; Deering's Gen. Laws, 1944, Act 8488. The Act has been codified in the Revenue and Taxation Code as Section 23001, et seq., effective July 1, 1951. These cases relate to a period prior to the codification, and references will be made to sections of the Act rather than to the Code.

2. Traynor and Keesling, Recent Changes in the Bank and Corporation Franchise Tax Act, 21 Calif. L. Rev. 543, 22 Calif. L. Rev. 499, 23 Calif. L. Rev. 51. Traynor, National Bank Taxation in California, 17 Calif. L. Rev. 83, 232, 456.

3. Cal. Stats. 1933, p. 871.

4. The tax imposed on national banks under the Bank and Corporation Franchise Tax Act was "in lieu of all other taxes and licenses, state, county and municipal * * * except taxes upon * * * real property." (Section 3)

From 1933 through 1949, subdivision 3 of Section 4 of the Act imposed a franchise tax at the flat rate of 4 per cent of net income upon every corporation except financial corporations and those exempted by the Constitution or the Act. The corporations taxable under this provision (hereafter referred to as nonfinancial corporations) were required to pay, in addition, other taxes including personal and real property taxes. Banks and other financial institutions[5] were required to pay a tax measured by net income[6] at a rate not to exceed 8 per cent, made up of two parts: (1) A flat rate of 4 per cent, as paid by nonfinancial corporations, and (2) an additional percentage determined on the basis of the ratio between the total California personal property taxes required to be paid by nonfinancial corporations and their total net incomes attributable to California.[7] (Section 4a) This rate was determined annually by the Franchise Tax Commissioner after affording the banks and financial corporations a public hearing and an opportunity to examine the data on which his determination was to be based. (Section 4a)

The Commissioner each year compiled information as to the net incomes and personal property taxes of nonfinancial corporations from their verified franchise tax returns, from audit adjustments dealing with additional assessments and abatements, and from other materials obtained from the corporations. The information was tabulated in statistical form, and transcripts of the returns were made which con-

5. Sections 1, 2 and 4(1) of the Act.

6. Revised Statutes, Section 5219, authorizes state taxation of national banks "according to or measured by their net income."

7. In 1933 and 1934, Section 4a provided that the flat rate, like the one then applicable to nonfinancial corporations, was 2 per cent (rather than 4 per cent) and that the combination of the flat rate and additional percentage should not exceed 6 per cent.

tained the property tax and net income figures with serial numbers instead of names being used to designate the corporations. Two reports containing a proposed tax rate were prepared, one showing an over-all computation and the other a computation by industrial groupings. At the hearings held by the Commissioner the banks were permitted to inspect the transcripts and the statistical material, and members of the Commissioner's staff, having possession of the original returns, answered questions as to their contents so that the lists furnished plaintiffs could be checked for accuracy so far as this could be done without disclosing the names of the corporations.

Additional information and methods of verification were made available to appellants at the trial, specific reference to which will be made in the argument that follows.

Appellants contended they should be allowed unrestricted examination of the tax returns of the nonfinancial corporations despite the provisions of Section 35 of the Act concerning nondisclosure of the amount of income or the business affairs of the corporate taxpayers appearing in their tax returns.[3]

## ARGUMENT IN SUPPORT OF MOTION

**The Questions Are Not Substantial.**

### I. IT IS SETTLED BY PRIOR DECISIONS OF THIS COURT THAT THERE HAS BEEN NO VIOLATION OF DUE PROCESS OF LAW.

#### A. Although the Function of Computing the Bank Tax Rate Was Quasi-Legislative, Information and Hearing Sufficient Even to Satisfy the Requirements of a Quasi-Judicial Proceeding Were Available to Appellants.

This Court in numerous instances has observed that the nature of the function involved is significant when due process concepts are to be considered. In *Hannah v. Larche*,

8. The purpose of the nondisclosure provisions of Section 35 is to facilitate tax enforcement by encouraging taxpayers to make full and truthful declarations in their tax returns.

363 U.S. 420, 440, it was noted that the requirements of due process frequently vary with the type of proceeding involved. What is due process in procedure varies with the governmental purpose to be accomplished and with the nature of the interests affected.

The governmental power here involved is the state taxing power. It is settled law that practical considerations must obtain in tax matters. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441; *International Harvester Co. v. Evatt*, 329 U.S. 416, 422. The validity of computing a tax rate on the basis of taxes paid by others is well established. *Michigan Central Railroad Co. v. Powers*, 201 U.S. 245. It also has been recognized that complexities may be such that as a matter of practical tax administration "rough approximation rather than precision" is sufficient. *International Harvester Co. v. Evatt*, 329 U.S. 416, 422.

The California statute required the Commissioner to make a statistical survey as to the California net income and California personal property taxes of thousands of non-financial corporations for the purpose of computing a tax rate applicable to a large and indefinite group of taxpayers, including national banks, state banks and all corporations classed as financial corporations,[9] such as savings and loan associations. (Sections 1, 2 and 4)

We are concerned, therefore, with general or legislative facts, not with individual facts—with quasi-legislative action, not with quasi-judicial action. *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441.

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9. Corporations classed as financial corporations are those that are in substantial competition with national banks. *U.S. Loan Service, Inc. v. McColgan*, 21 Cal. 2d 518; *Crown Finance Corp. v. McColgan*, 23 Cal. 2d 280.

The Supreme Court of California referred to the decision of this Court in the *Bi-Metallic Investment Co.* case in pointing to the differences between quasi-legislative and quasi-judicial action. In that case this Court said:

> "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule. If the result in this case had been reached as it might have been by the State's doubling the rate of taxation, no one would suggest that the Fourteenth Amendment was violated unless every person affected had been allowed an opportunity to raise his voice against it before the body entrusted by the state constitution with the power * * *." (page 445)

Appellants in attempting to avoid the impact of the *Bi-Metallic* case,[10] state that in that case the taxpayers had already had, at the local level, the hearing as to comparative valuations to which they were constitutionally entitled under ad valorem procedures. Appellants, however, completely miss the point of the *Bi-Metallic* case. The hearing which the taxpayer had in the *Bi-Metallic* case was as to the valuation of its individual property in relation to the valuation of other property in the county and is comparable to the hearing available to each appellant here as to the amount of its net income. Each bank had the opportunity to explore fully into any adjustment of the net

10. Jurisdictional Statement, page 17, footnote 22.

income of that bank made by the Commissioner. On the other hand, raising the level of valuation of all property in a county, for purposes of a statewide tax, as to which the taxpayer in *Bi-Metallic* sought and was denied a hearing, is comparable to the rate computation here. General facts, rather than individual facts relating to a particular taxpayer, were involved in both the valuation increase order of the *Bi-Metallic* case and the bank tax rate determination of the present cases.

*Bi-Metallic* establishes that the same due process standards do not apply to general facts as apply to individual facts. *Londoner v. Denver*, 210 U.S. 373, 386, cited by appellants, shows that even when individual facts are concerned, procedural due process standards in tax cases may be far less stringent than those in other cases.[11]

Under these authorities, procedural due process certainly does not require in the determination of a tax rate based on the amount of net income and the amount required to be paid as personal property taxes by several thousand corporations[12] that the banks be permitted to scrutinize and cross-examine in meticulous detail as to every individual corporation as they contend.

The Commissioner's action in making an annual computation of the bank tax rate was characterized as a quasi-

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11. In the *Bi-Metallic* case, this Court observed (page 446) that the property owners in the *Londoner* case "• • • were exceptionally affected, *in each case upon individual grounds* • • • (Emphasis added.) The state statute in *Londoner* denied a landowner the right to object in the courts to the special assessment made against his property. This Court nevertheless indicated that the requirements of due process would have been satisfied if the taxpayer had been accorded the opportunity before the taxing agency "to support his allegations by argument however brief, and, if need be, by proof, however informal." (page 386)

12. As mentioned by appellants, the Commissioner in 1949, for example, had the task of ascertaining the total California net income and total California personal property taxes of 36,000 corporations.

legislative function by the California Supreme Court and appellants recognize,[13] that we are here concerned with a quasi-legislative function. They attempt, nevertheless, to apply standards of due process which are appropriate in quasi-judicial proceedings. Appellants rely on *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292; *St. Joseph Stockyards Co. v. United States*, 298 U.S. 38; *Morgan v. United States*, 298 U.S. 468; and *Interstate Commerce Com. v. Louisville & Nashville R. Co.*, 227 U.S. 88. These cases relate to the establishment or the validity of rates of public utilities. In public utility matters, affected parties are entitled to a hearing on the question of whether the rates are confiscatory and, also, on whether there is evidence in the record to support the order. As indicated by this Court in *Interstate Commerce Com. v. Louisville & Nashville R. Co.*, 227 U.S. 88, and *Morgan v. United States*, 298 U.S. 468, hearings relating to the confiscatory or non-confiscatory character of public utility rates constitute quasi-judicial action.

The contrast between the establishment of public utility rates on the one hand and tax rates on the other is well illustrated by the *St. Joseph Stockyards Co.* case where the Court pointed out that if the utility rates had been set by the legislature itself, they would have been subject to judicial scrutiny on the issue of confiscation, 298 U.S. 38, 51. On the other hand, it is readily apparent that a state legislature may establish tax rates and that due process does not require that a taxpayer be granted a judicial review of those rates. Cf. *Michigan Central Railroad Co. v. Powers*, 201 U.S. 245, 294-295.

If the Legislature had set the tax rate, appellants would not have any procedural due process right to inquire into how the rate was determined. For example, if the Cali-

13. Jurisdictional Statement, page 15.

fornia Legislature had enacted a flat rate, say of 7%, for a particular year, appellants could question in court whether they were subjected to a higher tax burden than other corporations, but they would have no opportunity to inquire how the 7% rate was arrived at by the Legislature.

Instead of enacting a flat rate, the Legislature provided for an annual computation by the Commissioner under a prescribed formula so that the rate would more nearly follow the fluctuation in the personal property tax burden of nonfinancial corporations. The statute also provided a maximum beyond which the rate could not go. Few indeed are the instances in which as much opportunity has been afforded to taxpayers for obtaining information as to how a tax rate is arrived at as is afforded with respect to the Section 4a tax rate.

It is to be observed that although the Commissioner in computing the bank tax rate was engaged in a quasi-legislative function, the hearing afforded the banks with respect to the tax rates here involved satisfied the requirements of a quasi-judicial proceeding as laid down in the *Ohio Bell Telephone Co.* case, 301 U.S. 292. In discussing that case, the California Supreme Court first pointed out that *Ohio Bell* involved regulation of the rates of a single utility in contrast to the instant case and the *Bi-Metallic* case which involved action applicable to many persons. The Court went on to point out that in the *Ohio Bell* case a rate order was made at the administrative level without knowledge on the part of the utility as to the statistical information and trade journals relied on by the Commission in setting the rates and without any right of judicial review of the rate order. On the other hand, as stated by the California Supreme Court, " * * * In the present cases plaintiffs were informed of the material relied upon by the commissioner

as discussed above, and thereafter they were given opportunities for reasonable verification of that material and for attacking the rates by introducing any relevant, nonprivileged evidence."[14]

Voluminous details as to how the bank tax rate was computed were provided appellants at the bank tax rate hearings,[15] and these details were included in the record of this trial by way of stipulated testimony.[16] Thus, transcripts of bank tax rate hearings extending over some 2,200 pages of the reporter's transcript of the trial in these cases, were placed in the record. In addition, various officials and employees of the appellee were called by appellants and examined as witnesses during the course of the trial. Through these witnesses and the stipulated testimony previously mentioned, appellants were in a position to explore in detail the various steps of the Commissioner's practice in determining the bank tax rate.

With respect to the net income factor, appellee provided appellants with a list utilized by the Commissioner in the bank tax rate computations setting forth for each corporation the serial number of its franchise tax return[17] and the amount of its net income. Appellants had the opportunity to check the returns and other documents, with the serial number but not the name of the corporation disclosed, to ascertain whether the net income figures appearing on such returns and other documents corresponded with those ap-

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14. 55 Adv. Cal. 409, 423; Appendix to Jurisdictional Statement, page 17.

15. Some of the methods of checking made available to the banks at the annual bank tax rate hearings are summarized in *Franchise Tax Board v. Superior Court*, 36 Cal. 2d 538, 542.

16. 11 Rep. Tr. 2896.

17. Serial numbers were stamped on returns consecutively as they were received by the Commissioner.

pearing opposite the same serial number in the list utilized by the Commissioner in the bank tax rate computations.

As mentioned by the California Supreme Court,[18] appellants failed to take advantage of the opportunity afforded them to check against the local property tax rolls the personal property tax figures (of identified corporations) used by the Commissioner. In this regard, appellee offered to make available, with certain minor exceptions, the name of each nonfinancial corporation and the personal property tax figure utilized by the Commissioner for each such corporation.[19] In providing this information, appellee in effect would be saying to appellants: "This is the personal property tax figure used for this corporation in computing the bank tax rate." With such information, appellants could have gone directly to the local property tax rolls, which are public records, to ascertain if the personal property tax figures utilized by the Commissioner corresponded with those shown by the local property tax records. Appellants could have made such an investigation *without resorting to the franchise tax returns of the nonfinancial corporations.*[20] Appellants, however, did not choose to do so, either through the application of acceptable sampling techniques or otherwise. In view of the availability of this and other information herein mentioned, appellants' contention they could not obtain information lacks substance.

In addition to the opportunities for verification previously discussed, numerous other methods of verification

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18. 55 Adv. Cal. 409, 421, Appendix to Jurisdictional Statement, page 12.

19. 23 Rep. Tr. 6200-6203.

20. In *United States v. Reynolds*, 345 U.S. 1, 11, this Court indicated that even where individual rather than legislative facts were involved a litigant who sought disclosure of certain confidential documents should have accepted the Government's offer of information from an alternative nonconfidential source.

were made available to appellants during the trial.[21] The State, throughout the trial, repeatedly offered to provide information to appellants, repeatedly proposed useful and substantial methods of testing the rate computations, and repeatedly offered to comply with any other reasonable and legal methods of verification that might be proposed by appellants.[22]

Reference to the opportunities for checking available to appellants was made by Chief Justice Gibson in speaking for the Supreme Court of California in this case as follows:

> "* * *Much material helpful to plaintiffs in determining the accuracy of the rate was made available to them at both the administrative hearings and the trial, and the only information withheld was such that it would have revealed to them, contrary to section 35, the amount of income or the business activities reported by named nonfinancial corporations. We are satisfied that plaintiffs received all the information they reasonably needed." (55 Adv. Cal. 409, 422, Appendix to Jurisdictional Statement, page 15)

Irrespective of whether appellants were entitled to a hearing as a matter of due process, the fact is that they had a hearing both at the administrative level and at the trial. As the California Supreme Court observed:

> "* * * Plaintiffs in the present cases obtained an independent judicial determination as to the validity of the tax rates after a fair opportunity to present evidence in support of their position. * * *" (55 Adv. Cal. 409, 423, Appendix to Jurisdictional Statement, page 16)

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21. For example, 17 Rep. Tr. 4536-4541, 4569-4571; 19 Rep. Tr. 5244-5245.

22. For example, 20 Rep. Tr. 5503; 21 Rep. Tr. 5677; 23 Rep. Tr. 6235.

Appellants' statement[23] that "The undisputed testimony was that the Commissioner's 'determinations' could not have been verified by any of the methods suggested by appellee" is misleading. The testimony to which appellants refer was given before some of the most significant offers by appellee were made. As pointed out in the opinion of the California Supreme Court, for example, "With respect to the personal property tax data used by the commissioner, an offer was made to provide, with certain exceptions, the names of the corporations together with the amount of tax each had paid. This offer was rejected by plaintiffs * * *."[24] This offer was made and rejected subsequent to the testimony referred to by appellants.

Appellants assert[25] there was no possible way of proving or disproving whether any of the figures included by the Commissioner in his rate computations were those of net income corporations. Contrary to appellants', assertions means were available for verifying that figures utilized by the Commissioner were those of net income corporations. Each tax return filed by a corporation contained the corporate number assigned to that corporation by the Secretary of State. Each tax return also was stamped with a serial number when it was received in the Commissioner's office.

Appellee offered to arrange the net income returns of corporations whose personal property taxes were utilized in the rate computations in corporate number sequence and to allow appellants to see the name and corporate number on each return as well as the affidavit and signature to verify that it was a genuine return. Appellee, upon

23. Jurisdictional Statement, page 18.

24. 55 Adv. Cal. 409, 421, Appendix to Jurisdictional Statement, page 12.

25. Jurisdictional Statement, page 18.

completion of this step, would rearrange the same returns in serial number sequence and allow appellants to check each return (without disclosing the identity of the corporation) to ascertain whether the corporation was a net income corporation. This would enable appellants to ascertain that the corporations whose personal property taxes were included in the rate computation were net income corporations.

Appellants' assertion[26] that the State of California has done everything in its power to prevent any judicial review as to the correctness of the rate computation is not well founded. It is in sharp contrast with the statements of the California Supreme Court that much material helpful to appellants in determining the accuracy of the rate was made available to them at both the administrative hearings and the trial, that appellants received all the information they reasonably needed and that they obtained an independent judicial determination as to the validity of the tax rates after a fair opportunity to present evidence in support of their position.[27]

In view of the information furnished to appellants, the offers to them of additional information and the opportunities available to them for verifying the Commissioner's computations and for presenting evidence, appellants' contentions concerning lack of procedural due process are not meritorious.

Certainly no substantial federal question of procedural due process is presented in view of *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, and the other precedents of this Court to which we have referred.

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26. Jurisdictional Statement, page 19.

27. 55 Adv. Cal. 409, 422-423, Appendix to Jurisdictional Statement, pages 15-16.

**B. This Case Does Not Involve the Imposition of Tax Liability Predicated Upon Incontrovertible Assumptions of Fact.**

Appellants' discussion to the effect that tax liability was predicated upon incontrovertible assumptions of fact is without merit. The California statute has been construed by the California Supreme Court as meaning that the amount assessed by the local assessing authorities and paid as personal property taxes is the figure to be used in computing the bank tax rate.[28] Appellants were free to controvert whether the nonfinancial taxpayers had paid the amounts of personal property taxes used by the Commissioner in the rate computation. Appellants contend they were entitled as a matter of due process to inquire into whether the local assessing authorities assessed the correct amount as personal property taxes. A similar argument was rejected by this Court in *Michigan Central Railroad Co. v. Powers*, 201 U.S. 245. This Court there held that the applicable state law construed as providing for a tax rate on railroad property computed on the basis of actual assessed valuations and actual taxes paid on the property of others was valid.

The California Supreme Court agreed that the taxing statute authorized the Commissioner to take the amount of personal property taxes assessed by the local authorities and paid as the amount required to be paid as personal property taxes in computing the bank tax rate. It was then the burden of appellants under Revised Statutes Section 5219 (12 U.S.C. § 548) to show, if such were the fact, that under the state statute as so construed a higher burden was imposed on appellants than the highest burden imposed on mercantile, manufacturing and business corporations. This they failed to do.[29]

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28. 55 Adv. Cal. 409, 423-424, Appendix to Jurisdictional Statement, pages 17-18.

29. The trial court's finding that a higher burden was not imposed is set forth in footnote 36.

## II. THE CALIFORNIA TAXING STATUTE CONFORMS WITH REVISED STATUTES, SECTION 5219.

The California bank tax was so designed as to preclude any possibility of a discriminatory tax burden in violation of Revised Statutes, Section 5219.[30] The only restriction imposed by that section on the use of the according to or measured by net income method of national bank taxation is that "* * * the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits. * * *"

The term "rate" is employed in this restriction in the sense of burden, rather than in the sense of arithmetical rate, (*Tradesmens National Bank v. Oklahoma Tax Commission*, 309 U.S. 560) just as it is in the case of the restriction on the share tax method.[31] *Amoskeag Savings Bank v. Purdy*, 231 U.S. 373; *Covington v. First National Bank*, 198 U.S. 100. The point was well summed-up in the decision this year in *Michigan National Bank v. Michigan*, 365 U.S. 467, 475, as follows:

> "* * * And so, we are taught that in determining the burden of the tax—its discriminatory character—we look to its *effect*, not its *rate*. * * *"

That the California bank tax cannot impose a discriminatory tax burden in violation of Section 5219 may readily be established. State banks were taxed in exactly the same manner as were national banks. The banks, together with

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30. Traynor and Keesling, Recent Changes in the Bank and Corporation Franchise Tax Act, 22 Cal. L. Rev. 499.

31. "In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks. * * *" Revised Statutes, Section 5219.

other financial corporations [32] and with nonfinancial corporations, paid a tax measured by net income at a 4% rate.[33] The banks and other financial corporations paid an additional tax measured by net income at a rate based on the ratio of the total amount required to be paid as personal property taxes[34] by the nonfinancial corporations to the total California net income of these corporations.[35]

While the California tax burden on financial corporations may exceed, it cannot be less than, that on banks. As compared with nonfinancial corporations, banks pay a tax measured by net income at a total rate equal to the rate of the franchise tax paid by those corporations plus a rate representing the average burden of the personal property taxes of those corporations in terms of their net income. The only possible conclusion on a comparison of the tax

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32. The term "financial corporation" included all corporations, e.g., savings and loan associations, engaged in substantial competition with national banks. *H.A.S. Loan Service, Inc. v. McColgan*, 21 Cal. 2d 518; *Crown Finance Corp. v. McColgan*, 23 Cal. 2d 280. Such financial corporations pay personal property taxes, but are allowed to offset those taxes against their franchise tax payments, the franchise tax after allowance of the offset not to result, however, in a lesser rate of tax than that applicable with respect to the net income of banks.

33. The rate was 2% for the years 1933 and 1934.

34. The many other taxes imposed by the State and its political subdivisions to which the nonfinancial corporations were subject, but from which the banks were immune, were not considered in arriving at this additional tax.

35. The rate of the additional tax was limited by the taxing statute to 4%. If, therefore, the ratio of the total amount required to be paid as personal property taxes by the nonfinancial corporations to the total California net income of those corporations resulted in a bank tax rate of 2.5%, the banks and financial corporations paid an additional tax according to or measured by their respective net incomes at a 2.5% rate. If, however, that ratio resulted in a rate in excess of 4%, as it did for many years (1933—5.56%; 1934—4.83%; 1935—4.95%; 1936—4.01%; 1937—5.64%; 1938—4.58%; 1939—5.52%; 1940—6.34%; 1941—5.36%), the banks and financial corporations paid an additional tax according to or measured by their respective net incomes at a rate of only 4%. Finding 6, e.g., Sac. No. 6954, Clk. Tr. 55.

burdens of banks and nonfinancial corporations was expressed by the California Supreme Court as follows:

> "* * * The total percentage of net income paid by banks as franchise taxes is equal to the percentage paid by nonfinancial corporations as a group from their combined net incomes as franchise taxes and personal property taxes. Thus, if the banks are required to pay a higher percentage of their net income than some of those corporations, there are necessarily others paying a greater portion of their net income than the banks pay. It is apparent that the tax burden of the banks is not 'higher than the highest of the rates' imposed upon nonfinancial corporations and is in accord with section 5219." (55 Adv. Cal. 409, 417; Appendix to Jurisdictional Statement, page 6)[36]

Appellants do not assert that California imposes upon banks a discriminatory tax burden, but only that California imposes upon banks a discriminatory *franchise tax* burden. A comparison of *franchise tax* burdens is not, however, the test of compliance with Section 5219. As this Court pointed out with great clarity and precision in *Tradesmens National Bank v. Oklahoma Tax Commission*, 309 U.S. 560, 568, the resolution of the issue of discrimination "* * * turns upon an examination of the *whole tax structure of the state.* * * *" (Emphasis added.)

Appellants seek to limit the principle of the *Tradesmens* case by asserting that the true rationale of the case is that where a state reaches the tax-exempt income of national banks under one type of franchise tax, it is competent

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36. The trial court found for each year in question that "the tax burden imposed by the State of California upon plaintiff and other banks for the taxable year was neither higher than the tax burden imposed by the State upon other financial corporations nor higher than the highest of the tax burdens imposed by the State upon mercantile, manufacturing and business corporations doing business within the State of California." Finding 19, e.g., Sac. No. 6952, Clk. Tr. 196.

for it to reach the tax exempts of nonfinancial corporations under another type of franchise tax, provided discrimination against banks is not shown. There is not the slightest degree of support for this position in the opinion of the Court. The references in the opinion to "the whole tax structure of the state" and to "all the taxes imposed upon business and mercantile corporations doing business in the state" and the specific reference to an ad valorem tax establish that the Court regarded a comparison of total tax burdens, not one solely of franchise tax burdens, as the standard for determining compliance of a state tax on national banks with Section 5219.

California has not taxed, either directly or indirectly, the personal property of banks. The amount of tax to be paid by a bank does not depend upon or vary in any way with the amount of personal property owned by the bank.[37]

It is entirely permissible for California to include the interest income of banks from federal securities in the measure of the franchise tax on the banks. *Tradesmens National Bank v. Oklahoma Tax Commission*, 389 U.S. 560, 564. The tax burden imposed on banks not being higher than that imposed on other financial corporations nor higher than the highest imposed on mercantile, manufacturing and business corporations, the fact that banks may hold more tax-exempt securities than other classes of taxpayers offers no basis for objection to the State's method of taxing banks under Section 5219.

37. Traynor and Keesling, Recent Changes in the Bank and Corporation Franchise Tax Act, 22 Cal. L. Rev. 499, 507.

## CONCLUSION

Inasmuch as appellants' contentions have been foreclosed by prior decisions of this Court, we respectfully submit that these appeals should be dismissed or in the alternative that the judgments of the Supreme Court of California should be affirmed.

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**(Appendix Follows)**

## *Appendix*

### California Bank and Corporation Franchise Tax Act, Section 2.

SECTION 2. TAX ON STATE BANKS. Every bank, other than a national banking association, located within the limits of this State, shall annually pay to the State for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, upon the basis of its net income for the next preceding fiscal or calendar year at the rate provided for in Section 4a hereof.

### California Bank and Corporation Franchise Tax Act, Section 3.

SECTION 3. BANK TAXES IN LIEU OF OTHER TAXES. The tax referred to in Sections 1 and 2 hereof shall be in lieu of all other taxes and licenses, state, county and municipal, upon the banks and banking associations therein mentioned, except taxes upon their real property.

### California Bank and Corporation Franchise Tax Act, Section 4.

SECTION 4. TAX ON CORPORATIONS. (1) TAX ON FINANCIAL CORPORATIONS. Every financial corporation doing business within the limits of this State, taxable under the provisions of Section 16 of Article XIII of the Constitution of this State, shall annually pay to the State for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, upon the basis of its net income for the next preceding fiscal or calendar year at the rate provided for in Section 4a hereof.

(2) FINANCIAL CORPORATIONS; TAX OFFSET. Each such financial corporation shall be entitled to an offset against said franchise tax, in the manner hereinafter provided, in the amount of personal property taxes and license fees for the privilege of operating as personal property brokers, or brokers as defined in Chapter 634, Statutes of 1909, as amended, and those engaged in the business of loaning money, advancing credit, or loaning credit or arranging for the loan of money or advancing of credit or loaning of credit, paid during the income year to this State or to any county, city and county, city, town or other political subdivision of the State, and licenses for the privilege of operating motor vehicles paid to this State under Chapter 362, Statutes of 1935, as amended; provided, however, that the tax on such financial corporation after the allowance of offset shall not be less than 4 percentum of its net income for the preceding fiscal or calendar year or less than twenty-five dollars ($25).

(3) TAX ON OTHER CORPORATIONS. With the exception of financial corporations, every corporation doing business within the limits of this State and not expressly exempted from taxation by the provisions of the Constitution of this State or by this act, shall annually pay to the State, for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of 4 percentum upon the basis of its net income for the next preceding fiscal or calendar year. In any event, each such corporation shall pay annually to the State, for the said privilege, a minimum tax of twenty-five dollars ($25).